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Case No. 87-1001

In the Supreme Court
OF THE
United States

H.K. PORTER COMPANY, INC.,
Petitioner,

VS.

METROPOLITAN DADE COUNTY,
and JOHN A. DYER,
Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS IN RESPONSE TO INTERVENING AMICUS BRIEF OF THE UNITED STATES

ROBERT A. GINSBURG
Dade County Attorney
Metro-Dade Center
Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993
(305) 375-5151

By

Robert A. Cuevas, Jr.
Assistant County Attorney

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INTRODUCTION

This supplemental brief is submitted in response to the intervening amicus brief of the United States.

DISCUSSION

The United States concedes (Br. of U.S. 10) this case does not independently merit certiorari review. Nevertheless, it recommends (Br. of U.S. 10 and 11) the case be held because it "may eventually merit this Court's attention" depending on what the Court decides in *City of Richmond v. J.A. Croson, Co.*, prob. juris. noted No. 87-998, Feb. 22, 1988. The government makes this recommendation notwithstanding its recognition that "this case is

distinguishable from *J.A. Croson Co.*...." (Br. of U.S. 10).

What makes this case distinguishable is the fact that the minority subcontractor goal here in issue was federally mandated based on Congressional findings of discrimination (See, Br. in Opp. 7-9). The Court has recognized Congress' unique authority in this area. Thus, in *Fullilove v. Klutznick,* The Court noted:

> Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct.

448 U.S. at 483-84 (opinion of Burger, C.J.). Similarly, Justice Powell there recognized:

> The history of this Court's review of congressional action demonstrates beyond question that the National Legislature is competent to find constitutional and statutory violations. Unlike the Regents of the University of California, Congress properly may — and indeed must — address directly the problems of discrimination in our society.
>
> * * * *
>
> ... It is beyond question, therefore, that Congress has the authority to identify unlawful discriminatory

> practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing effects.

448 U.S. at 449 and 502. The race-conscious program at issue in *Croson* on the other hand, was created under the City of Richmond's local powers. As the power bases for two programs are fundamentally different, any decision in *Croson* can have no bearing on this case which is governed by the principles settled in *Fullilove*.

Further, the United States' recommendation to hold must be viewed in light of its prior actions in this very case. The United States required the minority goal in issue. *H.K. Porter v. Metropolitan Dade County,* 650 F.2d 778, 780 n.1 (5th Cir. 1981). In 1980, it reviewed Respondents' actions in applying this federally-mandated goal requirement to Petitioner's bid and found that Respondents had complied with its regulations thereon. *Id.* at 780-1. The United States participated in Petitioner's first appeal as amicus, there suggesting to the court of appeals that Respondents' application of the federal goal requirement was constitutional (Br. of U.S. 12, n.10).

Despite such prior actions, the United States urges (*Id.*) this case be held because it now concludes that its own and Respondents' actions in this matter may be unconstitutional in light of *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). Wygant did not deal with a federally-mandated program based on Congressional findings of discrimination, nor did it overrule or modify *Fullilove* which established the legal principles governing review of such federal actions. The decision in *Wygant* therefore does not afford any legal basis for holding this case.

Finally, even assuming for the sake of argument that the minority goal program here in issue was flawed — it is now defunct (Br. in Opp. 10-11). To Respondents' knowl-

edge there are no other pending cases involving this program, nor have any been cited by Respondents or the United States. The Department of Transportation's current affirmative action program differs substantively and procedurely from its former program which is at issue in this case (*Id.*). Therefore, this case has no precedential relevance in the current affirmative action context. Holding it would merely prolong litigation, the outcome of which can only affect the rights of the immediate parties.

CONCLUSION

This case is not independently worthy of certiorari review. It should not be held merely because an admittedly distinguishable case happens to be pending before the Court.

Respectfully submitted,

ROBERT A. GINSBURG
Dade County Attorney
Metro-Dade Center
Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993
(305) 375-5151

By: R. A. CUEVAS, JR.
Robert A. Cuevas, Jr.
Assistant County Attorney

CERTIFICATE OF SERVICE

I, Robert Anthony Cuevas, Jr., a member of the bar of this Court, hereby certify that on the 22 day of April, 1988, three copies of this Supplemental Brief were served by U.S. mail by depositing same in a U.S. mailbox, with first class postage prepaid, addressed to CHARLES FRIED, United States Solicitor General, 10th and Pennsylvania N.W., Room 5143, Washington, D.C. 20530 and to CHARLES C. KLINE, ESQ., at Mershon, Sawyer, Johnston, Dunwody & Cole, Suite 4500, Southeast Financial Center, 200 South Biscayne Boulevard, Miami, FL 33131, attorney for Petitioner.

R. A. CUEVAS, JR.

Assistant County Attorney